



**Ohando v Akama & 4 others (Environment and Land Appeal E003 of 2023)
[2023] KEELC 21537 (KLR) (16 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21537 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND APPEAL E003 OF 2023
AY KOROSS, J
NOVEMBER 16, 2023**

BETWEEN

JOHN OLOO OHANDO APPELLANT

AND

HENRY OPIYO AKAMA 1ST RESPONDENT

DAVID ONYANGO AKAMA 2ND RESPONDENT

THE LAND REGISTRAR, SIAYA COUNTY 3RD RESPONDENT

THE DISTRICT LAND SURVEYOR, SIAYA COUNTY 4TH RESPONDENT

THE ATTORNEY GENERAL 5TH RESPONDENT

*(Being an appeal from the ruling of the CM. Hon. M. O. Wambani
delivered on 18/08/2022 in Siaya ELC Case Number 76 of 2019)*

JUDGMENT

Background of the appeal

1. The ruling that is the subject of this appeal arose from a notice of motion application dated 02/02/2022 in which the 1st and 2nd respondents sought for hearing of the suit *de novo*. The motion was anchored on grounds the predecessor trial magistrate Hon. Ong'ondo had been transferred and the trial magistrate who was now seized of the case could not have an opportunity to observe the appellant's demeanour. Further, they contended Hon. Ong'ondo had improperly conducted proceedings.
2. The appellant opposed the motion by filing a replying affidavit which he deposed on 18/05/2022. He averred the motion subverted the expeditious disposal of the case. Further, the 1st and 2nd respondents' allegations were unsubstantiated. In addition, the motion lacked merit, was bad in law, frivolous, incompetent, vexatious and was an abuse of court process. Finally, he would be prejudiced if the suit



was to be heard *de novo* because he had already testified and closed his case and the respondents still had their day in court.

3. From the record, the motion was disposed of by written submissions. In its ruling, the trial court upon finding the 1st and 2nd respondents had raised reasonable grounds, allowed the motion. Aggrieved, the appellant was granted leave to appeal on 29/12/2022 and he eventually lodged an appeal before this court.

Appeal to this court

4. The appeal was postulated on several replicated grounds of appeal which can be summarized into one ground of appeal; the trial court erred in law and facts in finding and holding that the suit be heard *de novo*.
5. The appellant prayed for the appeal to be allowed with costs, the trial court's ruling and consequential orders be set aside and it be substituted with an order dismissing the motion and for the suit to proceed from where it had reached. As directed by the court, the appellant and 1st and 2nd respondents put in their submissions. However, the 3rd to 5th respondents did not participate in these proceedings.

Appellant's submissions

6. His counsel, Mr. Okumu, filed written submissions dated 18/05/2023. Counsel identified a single issue for determination; whether the trial court properly exercised its discretion judiciously in ordering the suit be heard *de novo*.
7. It was counsel's submission the trial court should have exercised its discretion based on Order 18 Rule 8 (1) of the [Civil Procedure Rules](#) which called upon the trial court to assess and establish whether the proceedings in question posed difficulty to it; which it had failed to do. Counsel relied on the case of [Wycliffe Mwavali Ondari v Council of Narok & another \[2022\] eKLR](#).
8. Counsel further submitted that the 1st and 2nd respondents had failed to prove bias by the previous trial magistrate and their allegations were speculative and devoid of evidence. Counsel submitted if anything, the 1st and 2nd respondents ought to have immediately made an application for the recusal of the previous trial magistrate rather than waiting till he had been transferred before making allegations against his conduct. Counsel relied on the case of [Kalpana Rawal v Judicial Service Commission & 2 others \[2016\] eKLR](#).
9. Counsel submitted the appellant would be prejudiced if the case was heard *de novo* as he had already testified and closed his case. On the other hand, the respondents had their day in court and failure to observe decorum was not the only basis upon which a matter should be heard *de novo*.

1st and 2nd respondents' submissions

10. Their counsel, Miss Obware, filed their written submissions dated 5/06/2023. Counsel identified two issues for determination; whether the appeal was arguable and who should bear the costs of the application.
11. Counsel submitted that when judicial officers exercise their discretionary power, they are guided by fairness as set out in Article 50 (1) of [Constitution](#); which the trial court appreciated when arriving at its decision.
12. Relying on [Mbogo & another v Shab \[1968\] EA p. 15](#), counsel stated the appellate court would not lightly interfere with the exercise of the trial court's discretion unless it had misdirected itself and arrived



at an erroneous decision. Counsel submitted the trial court exercised its discretion judiciously and prayed for the appeal to be dismissed with costs.

Analysis and determination

13. As this is a first appeal, this court is called upon to re-evaluate, re-examine and reassess the evidence from the lower court and come up with its own deduction. See *Selle v Associated Motor Boat Co.*, [1968] EA 123. As rightfully submitted by Miss Obware, whenever a court exercises discretion, there is always a presumption of correctness of the decision which is reversible only upon showing a clear abuse of discretion. See *Mbogo & another v Shab (Supra)*.
14. Having evaluated the grounds of appeal, submissions, notice of motion dated 10/01/2023 and affidavits in support or in opposition thereto and ruling that is the subject of this appeal, this court will adopt the consolidated ground of appeal as the single issue for determination.
15. In the instance of this case, Hon. Ong'ondo was transferred after he had taken the appellant's evidence who testified as PW1. The appellant's case has not been closed and as it were, upon his transfer, the matter was taken over by the trial court presided over by Hon. M.O. Wambani.
16. As pointed out by Mr. Okumu, by the provisions of Order 18 Rule 8 (1) of the *Civil Procedure Rules*, the incoming judicial officer was to proceed with evidence taken in the non-concluded matter as if it had been taken down by her. This proviso provides as follows: -

“Where a judge is prevented by death, transfer, or other cause from concluding the trial of a suit or the hearing of any application, his successor may deal with any evidence taken down under the foregoing rules as if such evidence had been taken down by him or under his direction under the said rules, and may proceed with the suit or application from the stage at which his predecessor left it.”

17. In considering whether or not to grant *de novo* orders in a civil suit, the trial court was by Sections 1A and 1B of the *Civil Procedure Act* guided by the court's overriding objective of just, expeditious, proportionate and affordable resolution of disputes.
18. In the context of a criminal trial, the Supreme Court of Kenya in *Hussein Khalid and 16 others v Attorney General & 2 others* [2020] eKLR stated: -

“A Judicial officer who hears the case is the one preferred to decide on it, unless parties elect otherwise, so that the accused is not prejudiced by having a successor in jurisdiction, who never had the opportunity to appreciate the evidence of witnesses by observing their demeanor...”

19. The legal principles that guide a court in exercise of its discretion when faced with the question of whether a matter should proceed *de novo* was well summarised by the persuasive decision of *Wycliffe Mwavali Ondari v County Council of Narok & another* [2022] eKLR as follows: -

“In sum, in deciding whether or not a case should start *de novo*, the court should consider: -

- i) Whether the successor Judge is in as good a position as his predecessor would have been in to evaluate the evidence and submissions;
- ii) Availability of witnesses who have testified; may be they are not available or cannot be procured or cannot be procured except with great expense of time, money;



- iii) The dictates of the overriding objective, and the principle of justice in article 159(2)(b) of the Constitution; inter alia delay and cost effect of the order;
 - iv) The prejudice that will be suffered by the parties; balancing of rights is important here.”
20. Black’s Law Dictionary, 8th edition, at page 499 has defined judicial discretion to mean: -
- “The exercise of judgment by a judge or court based on what is fair under the circumstances guided by the rules and principles of law; a Court’s power to act or not to act when a litigant is not entitled to demand the act as a matter of right.”
21. In applying the provisions of law, settled principles and modification of Hussein Khalid and 16 others v Attorney General & 2 others (*Supra*) to a civil suit, the hearing of a suit *de novo* affords a party a right to fair hearing as set out in Article 50 of the Constitution but this has to be balanced with the right of a litigant to have his suit expeditiously disposed of as envisaged in Article 159(2)(b) of the Constitution of Kenya and Sections 1A and 1B of the Civil Procedure Act.
22. In arriving at its decision, the trial court stated: -
- “...this court has found that that the Respondent/Plaintiff has raised reasonable reasons as to whether the case should start *de novo*. Because each party to this case has an equal, unconditional right to be heard, this court will invoke its discretion and proceed to direct that this case do start *de novo* and each party be heard as appropriate.”
23. It is on the basis of this portion of the finding that the appellant has approached this court. The trial court exercised its discretion on two grounds; reasonableness and right to fair hearing. In answering the issue for determination, this court has to revisit the motion that was the subject for determination.
24. Some of the grounds the 1st and 2nd respondents postulated as the basis upon which the suit was to commence *de novo* was untenable. Issues of biasness and impartiality of Hon. Ong’ondo, conduct of the trial court and intimidation of counsel should have been the basis for seeking recusal or disqualification of Hon. Ong’ondo. This is buttressed in the standards of conduct for judicial officers and judges as enacted in Regulations 9 and 21 Part II of the Code of Conduct Judicial Service (Code of Conduct and Ethics) Regulations 2020 which calls for impartiality of judicial officers and judges.
25. It is noted the 1st and 2nd respondents never made an application for recusal. Suffice to say, when they appeared before Hon. Ong’ondo for further hearing on diverse dates of 27/05/2021 and 26/08/2023, they gave several reasons for seeking an adjournment. At no time did they ever question his conduct or seek his disqualification. It can only be concluded these grounds were red herrings.
26. This court is now left to analyse the residual grounds of whether the trial court could based on the evidence taken, satisfy itself that it was in a good position to proceed with the evidence from where Hon. Ong’ondo had left it.
27. From the record, the trial court had no qualms in proceeding with the suit from the stage at which Hon. Ong’ondo had left it. It follows the question of the appellant’s demeanour was a non-issue to it. I say so because the issue of whether the suit should commence *de novo* emanated from the bar. In the impugned ruling, the trial court never expressed its incapability of proceeding with the suit from where it had reached. It only arrived at its reasons and finding from the 1st and 2nd respondents’ grounds.



28. Unlike criminal cases where *de novo* hearing is by Section 200 (3) of the *Criminal Procedure Code* a matter of right and an accused person may demand that any witness be resummoned and reheard, in civil cases, it appears, the trial court has to first satisfy itself whether it could proceed from where its predecessor left it off. This court notes that by the provisions Order 18 Rule 10 of the *Civil Procedure Rules*, the trial court could recall and examine witness. The grounds postulated by the 1st and 2nd respondents did not hold water.
29. The suit has been pending in court since 2019, the appellant testified before the order that the suit be heard *de novo* was made and no doubt he would be prejudiced if the suit was heard afresh.
30. Having not satisfied the ingredients of *de novo* hearing, the trial court in considering the appellant's right to expeditious disposal of his suit, should have applied the principle of overriding objective of the court and declined the request to have the suit re-heard afresh and should have directed the case to proceed from where it had reached. I find the trial court erred in ordering the suit to commence *de novo*. In the interests of justice, this matter should be heard on priority basis.
31. For the reasons stated above, I find the appeal succeeds with costs to the appellant. The impugned ruling is set aside and substituted with an order dismissing the notice of motion dated 02/02/2022 with costs to the appellant. I direct the suit be set down for hearing on priority basis.
32. It is so ordered.

DELIVERED AND DATED AT SIAYA THIS 16TH DAY OF NOVEMBER 2023.

HON. A. Y. KOROSS

JUDGE

Judgment delivered virtually through Microsoft Teams Video

Conferencing Platform in the Presence of:

Mr. Owuor for the appellant

Miss Raburu h/b for M.M. Omondi for the 1st and 2nd respondents

N/A for 3rd – 5th respondents

